SUPREME COURT, U. S.

No. 73-631

FILED

MAR 12 1974

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1973

HOWARD JOHNSON CO., INC.,

Petitioner,

v.

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae,* in support of the position of the respondents, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 111 national and international labor unions having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

John Wiley & Sons v. *Livingston*, 376 U.S. 543 (1964), a unanimous opinion by Mr. Justice Harlan, stated the basic principles of the § 301 federal law of labor agreements with regard to the survival of the obligation to arbitrate across a change in ownership. Then, two years ago, *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, delineated the § 8(a)(5) law regarding the survival of the statutory obligation to bargain across such a change, and in so doing distinguished between the contractual obligations enforceable in the courts as declared in *Wiley* and the statutory bargaining obligations enforceable before the Board. Finally, just two months ago, *Golden State Bottling Co.* v. *NLRB*, ... U.S. ....., 42, U.S.L.Wk. 4039, 4043, a unanimous opinion by Mr. Justice Brennan approving the Board law regarding a purchaser's duty to remedy a § 8(a)(3) violation committed prior to a *bona fide* sale, affirmed *Wiley's* continuing vitality.

Nevertheless, the Chamber of Commerce, nothing loath, argues that the unanimous holding of this Court in *Wiley*, the essential premise of which has so recently been unanimously reaffirmed, is no longer good law: "*Wiley* and *Burns* * * * are logically irreconcilable * * *. In essence, *Wiley* creates a fiction of 'survival'. In *Burns*, this Court rejected the fiction." C. of C. Br. 4, 7.

We begin with a demonstration of the insubstantiality of the premise for this attack upon *Wiley*—that its reasoning and result cannot be reconciled with that of *Burns*. Then, in what is perhaps an excess of caution, we show that the development of the law since *Wiley* does not disturb, and in major particulars reinforces the validity of *Wiley's*

rationale.

1. *Wiley* was a § 301 case brought by a union to compel the surviving corporation (Wiley) in a merger to honor the arbitration obligation imposed in the collective agreement between the union and Interscience, the merger partner that did not survive. This Court concluded that there was "relevant similarity and continuity of operation across the change in ownership," and, that being so, said: "We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of a national labor policy." 376 U.S. at 550, 551.

Subsequently, in *Burns*, which arose not under § 301 but under § 8(a)(5), the provision setting out the duty to bargain, this Court while concluding that:

> "Where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of § 8(a)(5) and § 9(a) by ordering the employer to bargain with the incumbent union;" (406 U.S. at 281)

also ruled that:

> "It does not follow, however, from [this] duty to bargain that [the new employer] was bound to observe the substantive terms of the collective-bargaining contract the union had negotiated with [the previous employer] and to which [the new employer] had in no way agreed. Section 8(d) of the Act expressly provides that the existence of such bargaining obligation 'does not compel either party to agree to a proposal or require the making of a concession.'" (*Id.* at 281-282.)

In other words, *Wiley* implied, from the collective agreement in force at the time of a change in ownership, "construed in the context of a national labor policy," a *contractual* obligation to arbitrate which is binding on a "successor" that runs with a continuing industrial community; on the other hand, *Burns* holds that the statute does not impose on a successor an analogous statutory obligation to honor the entire predecessor—union contract.[1]

The Chamber argues that *Wiley's* and *Burns'* "continued co-existence permits a dichotomy that threatens to unravel the fabric of uniformity that Congress has sought and that this Court has directed in the establishment and enforcement of a national labor policy." C. of C. Br. 4-5. The short but complete answer to this is that *Burns* does not state new law; it reestablishes a limitation on the Board's authority understood at the time *Wiley* was decided.

In *Labor Board* v. *American National Insurance Co.*, 343 U.S. 395 (1952), the Court construed the duty to bargain under §§ 8(a)(5) and 8(d) of the Act and held that it is

> "clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (*Id.* at 404.)

That conclusion was based on the history of the Wagner Act, this Court's decision under the analogous Railway Labor Act in *Terminal Railroad Ass'n.* v. *Trainmen*, 318 U.S. 1, the legislative history of the 1947 amendments, and

[1] The Respondent's brief (at pp. 18-30) demonstrates that the term "successor" has a different import in the § 301 and § 8(a)(5) contexts. We therefore do not develop that point here.

particularly the express language of § 8(d). 343 U.S. at 401-404.

It was this understanding of the statutory duty to bargain which prevailed when *Wiley* was decided; and it was this view which underlay the Board decisions prior to *Wiley*, holding that a successor employer does not have a statutory duty to adopt his predecessor's contract.[2] The same statutory materials both governed the result in the post-*Wiley* decision in *Porter Co.* v. *Labor Board*, 397 U.S. 99, and provided the framework for the conclusion stated in part III of the *Burns* opinion that the earlier Board successorship rulings were correct, and that the Board erred when it read *Wiley* as requiring their overruling. See 406 U.S. at 281-291.

The argument which runs through the Chamber's brief that "*Wiley* permits indirectly what *Burns* prohibits directly" (C. of C. Br. 10), is based on a misreading of *Burns*, and necessarily also of § 8(d), for these speak only of limitations on the *Board's* power. The distinction Congress drew between "official compulsion" (C. of C. Br. 10)

[2] This Court's consciousness of that line of Board authority when it decided *Wiley* is evidenced by the distinction it drew between the question before it and that treated by the Board, supported by citation to relevant Board cases:

> "In addition, we do not suggest any view on the questions surrounding a certified union's claim to continued representative status following a change in ownership. See, e. g., *National Labor Relations Board* v. *Aluminum Tubular Corp.*, 2 Cir., 299 F.2d 595, 598–600; *National Labor Relations Board* v. *McFarland*, 10 Cir., 306 F.2d 219; *Cruse Motors, Inc.*, 105 N.L.R.B. 242, 247. This Union does not assert that it has any bargaining rights independent of the Interscience agreement; it seeks to arbitrate claims based on that agreement, now expired, not to negotiate a new agreement." (376 U.S. at 551.)

imposed by the Board and that imposed by a court was explained by Mr. Justice Stewart for a unanimous Court in *NLRB* v. *C & C Plywood*, 385 U.S. 421, 427-428:

> "When Congress determined that the Board should not have general jurisdiction over all alleged violations of collective bargaining agreements and that such matters should be placed within the jurisdiction of the courts, it was acting upon a principle which this Court had already recognized:
>
> > 'The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them.'
>
> "*Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen*, 318 US 1, 6. To have conferred upon the National Labor Relations Board generalized power to determine the rights of parties under all collective agreements would have been a step toward governmental regulation of the terms of those agreements. We view Congress' decision not to give the Board that broad power as a refusal to take this step." (Footnotes omitted.)

The Court then went on to establish that the denial to the Board of plenary jurisdiction over contractual questions does not mean that the agency has "no jurisdiction to consider a collective agreement prior to an authoritative construction by the courts," where that is necessary "to deal with the unfair labor practice charge" before it. *Id.* at 428-430. Thus, Congress' allocation of responsibility was based not on the view that the Board is institutionally incapable of construing agreements, but entirely on the

"principle" articulated in *Terminal Railroad Ass'n. supra,* and embodied in § 8(d).

The Chamber invokes "this Court's decisions which have stressed the necessity for decisional uniformity in the area of labor relations." C. of C. Br. 9, & n. 16, citing *inter alia, Teamsters Union* v. *Lucas Flour Co.,* 369 U.S. 95. But that case, and the others cited *id.,* deal with uniformity between federal and state law; Congress, of course, has power to establish a national labor policy which is not monolithic, but rather achieves simultaneously a variety of objectives even if these appear to some to contain "inherent inconsistencies," (C. of C. Br. 4), or to be "logically irreconcilable," (*id.* at 5). The *Lucas Flour* case itself demonstrates the power of the courts under § 301 to deprive a party of its economic weapons, despite the absence of an express contractual commitment renouncing these. That the Chamber would be among the last to disapprove the *Lucas Flour* result is apparent from its endorsement of that decision in its brief as *amicus curiae* in *Gateway Coal Co.* v. *United Mine Workers* (No. 72-782, this Term) at pp. 6. Yet if, as the Chamber argues, "*Burns* condemns all official compulsion—whatever the source," (C. of C. Br. 10, footnote omitted), this Court must overrule not only *Wiley* but *Lucas Flour.* For, in both cases it was determined, in accordance with familiar judicial procedures, that an agreement which contained a broad arbitration clause was " 'instinct with an [additional] obligation,' imperfectly expressed." *Wood* v. *Lucy, Lady Duff-Gordon,* 222 N.Y. 88, 90, 118 N.E. 214, 215.

Indeed, the opinion in *Gateway Coal Co.* v. *United Mine Workers,* ..... U.S. ....., 42 U.S.L.Wk. 4039, demonstrates

that the courts as a matter of judicial interpretation can impose the very duty to arbitrate which *American National Insurance, supra,* held may not be imposed by the Board. In *Gateway* the Court reaffirmed the presumption of arbitrability announced in the *Steelworkers* trilogy, and followed in *Wiley,* which directs arbitration of all grievances under an arbitration clause unless there is an express prohibition of arbitration, 42 U.S.L.Wk. at 4098-4099. But in *American National Insurance* the Court squarely held that it would contravene § 8(d) for the Board to prohibit bargaining for a broad management functions clause designed to avoid arbitration of all the subjects covered in that clause, (343 U.S. at 404-409). Thus, *American National Insurance* holds that the Board may not determine the scope of the duty to arbitrate. The Courts however, may and frequently do exercise such authority. It is this power to imply a promise to arbitrate which the Chamber, in attempting to overturn *Wiley,* disparages as "sanction[ing] the *compulsion* of collective bargaining terms," (C. of C. Br. 8, emphasis in original). But compare the brief of the Chamber of Commerce as *amicus curiae* in *Gateway Coal Co.* v. *United Mine Workers* (No. 72-782, this Term) at pp. 6-10.

Additionally, the Chamber objects that the co-existence of *Wiley* and *Burns* would lead to "forum shopping" by unions. C. of C. Br. 9. While the point is not carefully articulated, the inconsistency asserted here is not between *Wiley* and part III of *Burns* (which disapproved the Board ruling that there is a § 8(a)(5) duty to honor a predecessor's contract), but between *Wiley* and part II of *Burns* (which approved the Board law that a successor does have a § 8(a)(5) duty to recognize the incumbent union). The thrust of the argument is that the successor's duty to arbi-

trate stated in *Wiley* is inconsistent with his duty stated in part II of *Burns* to bargain with the union over the terms of a new agreement.[3] The Chamber contends that the union would be given the opportunity to bargain if that suited its purpose and to impose the old contract by the § 301-arbitration route if that suited its purpose. To this there are two conclusive answers, one of principle and one of practicality.

The argument of principle is that there is no valid objection of policy to allowing a union or an employer which has both contractual and statutory claims to invoke either or both. These are "concurrent overlapping regimes neither preempting the other," (*NLRB* v. *Strong*, 393 U.S. 357, 360), and it is not forum shopping for a party to assert a right which Congress gave in the forum which Congress provided. See also *Steelworkers* v. *American International Aluminum Corp.*, 343 F.2d 147 (C.A.5); *NLRB* v. *Huttig Sash & Door*, 377 F.2d 964 (C.A.8).

Moreover, in the precise circumstances of successorship the Chamber's objection of onesidedness is totally misconceived.[4] For, if, under § 301 law as stated in *Wiley*, the new

[3] While the standards for successorship under § 301 differ from those under § 8(a)(5), see p. 4, n. 1, *supra*, there will be cases where an employer is a successor for both purposes, and the same union is the representative before and after the successor's takeover. It is in those situations that the problem hypothesized by the Chamber would arise.

[4] The only possibility of onesidedness in the present context is under a rule which would allow an employer who is taking over a business enterprise to determine whether he will or will not be a successor by establishing as the *sine qua non* of successorship that he hire a substantial number or a majority of the original workforce. See Pet. App. 7a.

employer is a "successor," that status does not depend upon the union's assertion of a claim of successorship. Rather, the employer can claim that he is a successor and invoke the arbitration clause, demanding arbitration over the scope of his contractual obligations. He, too, can insist that "industrial strife [be] avoided [and that the respective rights of the parties] be resolved by arbitration rather than by 'the relative strength * * * of the contending forces,' *Warrior & Gulf, supra,* 363 U.S. at 580." *Wiley,* 376 U.S. at 549.

2. We have seen thus far that the Chamber's principal argument—that *Burns* is inconsistent with *Wiley*—fails. In the course of developing that argument, however, the Chamber also attacks *Wiley* directly. We therefore show that *Wiley's* holding is sound today just as it was in 1964. This can best be done by recalling each of the premises upon which it rests and demonstrating their present validity.

(a) The § 301 law of successorship which *Wiley* "fashioned 'from the policy of our national labor laws,'" (376 U.S. at 548), is a considered rejection of "the principles of law governing ordinary contracts [that do] not bind to a contract an unconsenting successor to a contracting party," (*id.* at 550).

As Mr. Justice Harlan appreciated, the very reason for a federal law of labor agreements is that "a collective bargaining agreement is not an ordinary contract." *Id.* And "[c]entral to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance, see [*Steelworkers* v. *Warrior & Gulf,* 363 U.S.] at 580, and by the requirements of the National Labor

Relations Act, that it is not in any real sense the simple product of a consensual relationship." 376 U.S. at 550. The passage from *Warrior & Gulf* referred to in *Wiley*, stated:

> "When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations."

Just as the presuppositions of the "law governing ordinary contracts" do not control the law governing the making of collective agreements, they do not control the law governing the effect of collective agreements already made. Change is a fact of life no less certain than death and taxes, and prior to *Wiley* the law as to the impact of changes on the employee side was already well settled, and that law was not the "law governing ordinary contracts." Once a collective agreement is reached, it binds all employees, including those who do not wish to be represented in the establishment of the rules. In addition, all employees who are hired after the execution of the agreement, and who have had no voice either in selecting the union or in the negotiation or ratification of the agreement, are also bound. Moreover, no individual employee has the right to make a private agreement with the employer, and any such agreement is void. *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944). Finally, the federal law goes so far as to prohibit the employees from selecting a new bargaining representative during the term of an agreement (so long as it does not exceed three years). *General Cable Corp.*, 139 NLRB 1123.

In short, the federal law prior to *Wiley* (and all of the foregoing proportions remain good law today) was that an agreement is not a simple contract, binding only upon those who can be said to be parties to it in the conventional, common law sense. It is, rather, a privately created code, established by negotiation between union and management, regulating the industrial community during its term:

> "Without pushing the analogy too far, the agreement may be linked to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service * * * which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established." (*J. I. Case*, 321 U.S. at 335.)

Indeed, prior to *Wiley* the Court had not only differentiated labor agreements as such from ordinary contracts, it had distinguished between the enforceability, in these two contexts, of promises to arbitrate. (It is, of course, the binding effect of a promise to arbitrate that was at issue in *Wiley*.) In *Warrior & Gulf*, 363 U.S. at 578, it was explained that:

> "The run of arbitration cases, illustrated by *Wilko* v. *Swan*, 346 U.S. 427, becomes irrelevant to our problem. There the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial

> agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."

Certainly then, it would have been a sharp break to repair to the common law in determining the effect of a change in ownership on the continuing force of an arbitration clause of a collective agreement. Against the background just sketched, adoption of a rule that "a change in the corporate structure and ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established," (*Wiley*, 376 U.S. at 549), unless the new owner willed otherwise, would have created a disequilibrium in the federal law. On that view, while the duty to arbitrate is never affected by employee turnover, the successor employer would be free to insist upon or repudiate the arbitration agreement on the basis of his own self-interest rather than on the basis of neutral principles attuned to the national labor policy. Thus, unlike the rule adopted in *Wiley*, the successorship rule of ordinary contracts, which the Chamber prefers, would create an adventitious situation in which one party, but not the other, is bound by the agreement. Section 301 was enacted precisely because Congress believed that unions had been the beneficiary of a converse advantage since they were generally not subject to suit. And in *Boys Markets* v. *Retail Clerks*, 398 U.S. 235, this Court perceived a similar imbalance carrying "devastating implications for the enforceability of arbitration agreements," (*id.* at 247), (in that instance, favoring unions), under the aegis of *Sinclair Rfg.*

Co. v. *Atkinson*, 370 U.S. 195, and therefore overruled *Sinclair*.

(b) The "strong federal policy favoring arbitration of labor disputes was the lynchpin of this Court's reasoning in *Boys Market*." *Gateway Coal*, 42 U.S.L.Wk. at 4099. This accurately describes the reasoning of *Wiley* as well. For, Mr. Justice Harlan "recognized the central role of arbitration in effectuating national labor policy," (376 U.S. at 549), and rejected the common law successorship rule on the ground that "[i]t would derogate from 'the federal policy of settling labor disputes by arbitration," (*id.*). And *Gateway's* holding—"that the 'presumption of arbitrability' announced in the *Steelworkers Trilogy* applies to safety disputes" (42 U.S.L.Wk. at 4099)—parallels *Wiley's* reliance on this aspect of the national labor policy. Only the most callous disregard for the value of human life could justify the assertion that the arguments against arbitration in a successorship situation are more weighty than those advanced by the majority in the Third Circuit in *Gateway*.

The reasoning as well as the holding of *Gateway* is instructive here. Mr. Justice Powell first stated that "The federal policy favoring arbitration of labor disputes is firmly grounded in congressional command," (§ 203(d)), and endorsed the reading of that command in the *Steelworkers* trilogy. *Id.* at 4098-4099. Thus, both the statutory and decisional authority relied upon in *Wiley* were reaffirmed. Justice Powell then went on to apply the general principles stated in the *Trilogy* to the problem there at hand since they "are as applicable to labor disputes touching the safety of the employees as to other varieties of disagreement," (*id.* at 4099). The lessons drawn from national labor policy for

safety cases are equally pertinent in successorship cases.

First, in each, "industrial strife may as easily result from [the] unresolved controvers[y] * * * as from those on other subjects" which may arise during the term of an agreement. *Id.*

Second, "the special expertise of the labor arbitrator, with his knowledge of the common law of the shop, is as important to [*Wiley*] case[s] as to others." *Id.* A new owner may make extensive entrepreneurial changes and do so consistently with a broad management functions clause, (cf., *American National Insurance*, 343 U.S. at 404-409), and he may perceive problems and possibilities inherent in the situation facing the company that were unforeseen, and perhaps unforeseeable, from the vantage point of those who negotiated the contract. *Wiley* specifically directed that questions concerning the successor's obligations which thereupon arise are to be referred to the arbitrator to determine "the effect of the merger on the rights of the covered employees," (376 U.S. at 554-555).

Recognizing the fact that changed conditions may be taken into account in interpreting an agreement under *Wiley* is, of course, not to make new law, nor to allow the interpreter the power to pick and choose the contract terms he will enforce.[5] Even when there is only one employer it is by no means unusual for the contract to allow him to carry out entrepreneurial decisions designed to meet changed circumstances which result in extensive changes in the working environment of the plant. Moreover, be-

[5] Contrast *Alexander* v. *Graham-Denver Co.*, —— U.S. ——, 42 U.S. L.Wk. 4214, 4219 holding that the arbitrator's special competence does not extend to the interpretation of public law.

cause of the breadth of regulation undertaken in a collective agreement and the difficulties inherent in the attempt to set up a system of industrial self-government, unforeseeable contingencies will, of course, arise. As this Court has recognized, the foregoing does not mean that the resulting problems are deemed to be unregulated and that the agreement is no longer binding; their resolution, within the confines of the contract, are grist for the arbitrator's mill:

> "Arbitration is the means of solving the unforseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." (*Warrior & Gulf*, 363 U.S. at 581-58.)

Where a successor is involved, it is reasonable to suppose that there will be no shortage of these difficult questions of interpretation. But these questions will not be different in kind from those that arise in the one-employer situation. *Wiley* itself amply illustrates this point The most difficult problems in that case stemmed from Wiley's decision to consolidate two previously separate operations in one plant. And the complex task of working out those problems would have been similar if there had been no merger and if Wiley had been a two-plant company which decided to merge its two previously separate operations. See *Interscience Encyclopedia*, 55 LA 210, the arbitration which *Wiley* directed. The process of contract interpretation and administration mandated by §§ 203(d) and 301 insures

sufficient flexibility in cases involving one employer, and the underlying postulate of *Wiley* was that this process is sufficiently adaptable to serve the same salutary function where there is a successor. The event confirmed this Court's confidence.

In the *Interscience* arbitration the arbitrator concluded:

> "I. The five (5) issues submitted for determination pursuant to the terms of the collective bargaining agreement effective February 1, 1960, are arbitrable.
>
> "II. (a) The seniority rights built up by the Interscience employees shall be accorded to said employees up to January 12, 1962, the date the Interscience employees were moved to the Wiley headquarters and when the continuity of their identity separate from the Wiley employees ceased.
>
> "(b) In the circumstances of this case, the Company was not under any obligation to continue to make contributions to the District 65 Security Plan and District 65 Security Plan Pension Fund after September 30, 1961.
>
> "(c) The job security and grievance provisions of the Interscience Agreement continued in full force and effect up to January 12, 1962, but not thereafter.
>
> "(d) The Company did not have any continued liability for severance pay under the Interscience Agreement.
>
> "(e) The Company was not obligated to make the vacation payments under the Interscience Agreement after January 12, 1962. In accordance with this finding, the following employees shall be compensated in the stated amounts for accrued vacation based upon the

continuance of the Agreement until January 12, 1962, rather than October 2, 1961, the date of the merger:

Sophie Drucker	$50.72
Esther Gilbert	57.72
Janet Murray	71.14
Hoyt Peters	53.04
Esther Weinstein	54.08
Hazel Sinclair	51.30."

(55LA at 225-226.)

The ultimate result of the *Wiley* litigation was, therefore, sensitive to the successor's legitimate interests. And, viewed from the standpoint of the national labor policy, it is enlightening that the dispute was settled through an arbitration award accepted by all of the parties. None of the scattering of arbitrations since *Interscience,* so far as we are aware, have presented as complex a factual situation. And none are mentioned, much less subjected to reasoned criticism, by the Chamber which contents itself with the *ipse dixit* that *Wiley* is unworkable since it authorizes the arbitrator "contrary to his legitimate role, [to] 'dispense his own brand of industrial justice,' " (C. of C. Br. 10-11). We have already shown that this characterization is incorrect. Thus, these dire forebodings are best answered by this Court's reaction to the fears expressed by the Third Circuit in *Gateway:* "We see little justification for [such an] * * * assumption, especially since the parties are always free to choose an arbitrator whose knowledge and judgment they trust," (42 U.S.L.Wk. at 4099).

The *Gateway* decision also serves to underline another major aspect of the *Wiley* rule. For, Mr. Justice Powell tied the bond between the "implied obligation not to strike," stated in *Lucas Flour, supra,* 369 U.S. 95, and the

"'presumption of arbitrability' announced in the *Steelworkers Trilogy*," (42 U.S.L.Wk. at 4099). Both are contractual obligations implied in law and both may be negated only by "an explicit expression of such an intention," (*id.* at 4100). Because the law disfavors strikes over arbitrable disputes, the *Lucas Flour* presumption places a burden on unions that wish to retain that right. In contrast, the law favors the arbitration of disputes that arise during the term of an agreement and the burden imposed by the *Steelworkers* trilogy presumption (applied in *Wiley*) is therefore upon the party that desires to restrict the scope of the promise to arbitrate.

In the successorship context the allocation of this burden is entirely fitting, and not only because it serves the overall purposes of the national labor policy. The employer is the party in whose interest it is to maximize the alienability of the business and who controls the timing of a possible sale or merger. It avoids disrupting the bargaining process over a hypothetical problem to require him to wield the laboring oar. Moreover, a collective agreement does not define a series of rules whose breach can normally be recompensed in damages; "the mature labor agreement may attempt to regulate all aspects of the complicated relationship, [between the employer and employees and between the employees themselves] from the most crucial to the most minute over an extended period of time," (*Warrior & Gulf*, 363 U.S. at 580). For both parties the value of a major portion of the bargain rests on the availability of specific performance. Thus, the result reached in *Wiley* is buttressed by the reasoning in *Boys Markets* where the Court said:

> "Even if management is not encouraged by the unavailability of the injunction remedy to resist arbitration agreements, the fact remains that the effectiveness of such agreements would be greatly reduced if injunctive relief were withheld." (398 U.S. at 248.)

By the same token, where the continuity of the employing entity is retained over a change in ownership "the effectiveness of [arbitration] agreements would be greatly reduced if [specific performance against the successor] were withheld."

Again (see p. 19, *supra*), the Chamber contents itself with a rhetorical flourish, arguing that *Wiley* places "shackles" on employers that "discourage" transfers. C. of C. Br. 13-14. But *Wiley* no more shackles employers than *Lucas Flour* shackles unions. And, it is pertinent that the Federal Trade Commission's latest annual survey of *Current Trends in Merger Activity* (Statistical Report No. 10, Table 1), shows that in 1971 (the last year surveyed) there were 2,633 mergers and acquisitions, while in 1963, the year before *Wiley*, there had been 1,479.

(c) The third of the insights that informed the holding in *Wiley* is stated in the passage in that opinion quoted and followed in *Golden State Bottling Co.*, 42 U.S.L.Wk. at 4043:

> "The Board's *Perma Vinyl* principles introduced into the balancing process [used in determining a purchaser's obligation to remedy a § 8(a)(3) violation committed before a sale] an emphasis upon protection for the victimized employee.
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> "The Board found support for this policy, and we

think properly, in the Court's observation in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 549 (1964):

> 'Employees . . . ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.''

And just as *Golden State* reaffirms the national labor policy of according employees "some protection * * * from a sudden change in the employment relationship," the decision in *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965) provided a forceful expression of the "prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers."

The Chamber is not content to preserve this employer prerogative and to deprive employees of the protection stated in *Wiley;* it seeks to deliver his employees into a successor's hands stripped of all the Act's protections:

> "To unduly restrict an employer's ability to make initial adjustments necessary to convert a marginal business to a profitable one will discourage the purchase not only to the disadvantage of the predecessor but also to his employees. Extended negotiations, perhaps leading to impasse, would certainly hinder putting the business in good order and would not likely result in

> any benefit to the employees. * * * If the successor must bargain with the union over changing these pre-existing conditions, he is handicapped in turning the business around and making it viable." (C. of C. Br. 21.)

This is to retain so much of *Wiley* as insures employers transitions without industrial strife, while relieving employers of the concommitent obligations imposed by *Wiley* on the basis of § 301. It is just such one-sidedness with respect to contractual obligations that Congress and this Court have disapproved. See pp. 13-14 *supra*.

3. The principles stated in *Wiley* have not only continued to enjoy judicial acceptance, they have been granted implicit legislative approval.

On October 9, 1972, the Service Contract Act (41 U.S.C. § 351 *et seq.*), was amended by the addition *inter alia* of a new section 4(c) (set out as an Appendix at p. 25 *infra*) providing that a succeeding contractor shall pay its service employees no less than the wages and fringe benefits provided for in the collective bargaining agreement with the predecessor employer. Accordingly, so long as the incoming employer performs under a succeeding contract "under which substantially the same services are furnished" as were provided by the outgoing employer, the existing collective bargaining agreement with the predecessor employer establishes the norm for the compensation of the employees. The congressional purpose is to provide "assurance that employees working for service contractors under a collective bargaining agreement will have wages and fringe benefits under a new service contract no lower than those under current agreement." S. Rep. No. 92-1131, 92d Cong., 2d Sess., p. 1.

> "Ordinarily, where service employees are covered by a collective bargaining agreement, a successor contractor furnishing substantially the same services at the same location will be obligated to pay such service employees no less than wages and fringe benefits required by such agreement. This requirement would likewise apply to prospective wages and fringe benefits." *Id.*, at p. 4.

The national labor policy which Congress has thus expressed is that a change in the identity of the employers should not operate to divest the employees of the benefits of an existing collective bargaining agreement which had established the labor standards for performance of the work. That confirms the philosophy that informed the decision in *Wiley*.[8]

CONCLUSION

For the above stated reasons as well as those set out in

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[8] Both the Chamber (C. of C. Br. 20-21) and the Company (Co. Br. 37-41) address themselves to the question of the time at which the new employer's successorship status is to be determined. While it is not necessary for purposes of this case, since all the factors that either party deem relevant to the successorship determination remained constant throughout, we conclude with a brief response.

In *Burns*, successorship status was determined as of the time the new employer had selected its workforce, since the duty to bargain was derived from the fact that these were the employees of the previous employer. See 406 U.S. at 279 and 295. On the other hand, in *Golden State* the company's obligation to reinstate its predecessor's employees did not attach until it actually took over operations, and was thereby able to provide employment; necessarily, its backpay obligation did not begin to run until that time either. See 42 U.S.L.Wk. at 4040, 4045. The *Wiley* opinion did not focus on this question and determined successorship on the basis of what

the respondent's brief, the decision below should be affirmed.

Respectfully submitted,

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March 1974

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actually happened after Wiley took over. However, the correct solution in principle, we submit, is that successorship should be determined for § 301 purposes as of the time that the merger, sale, or other event transpires which determines that there will be a change in the employer's identity. For, both the protection of the employees and the preservation of industrial peace require that the parties know at that time whether there is an obligation to arbitrate, or contrariwise a right of the union to strike and the new employer to attempt to establish his own terms without regard to the rights of the employees under the prior agreement. This solution creates no difficulty, because in almost every instance the new owner will know the purpose for which he has acquired the business. When the union is informed that a change will take place, and demands arbitration the employer who has this information in his exclusive possession can, if he denies that he is successor explain why, in light of his plans, "any substantial continuity of identity in the business enterprise before and after [the] change" (376 U.S. at 551), will be absent.

APPENDIX

Section 4(c) of the Service Contract Act, as amended, 42 U.S.C. § 351 *et seq:*

> "No contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided,* That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality."